(1)

Supreme Court, U.S.
FILED
JUL 05 2001
OFFICE OF THE CLERK

No. 01-25

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

ALFRED TRENKLER,
PETITIONER

v.

UNITED STATES,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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44 pp

QUESTION PRESENTED

Whether the lower court erred when it held that the doctrine of unique circumstances is available only when incorrect information about the deadline for filing a notice of appeal is conveyed by the district judge herself, rather than by the district court's clerk.

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Rule 4(b)(4), Federal Rules of Appellate Procedure 2

Alfred Trenkler hereby petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit to review a final judgment in a criminal case.

ORDER BY THE COURT BELOW

On April 6, 2001, the United States Court of Appeals for the First Circuit entered judgment dismissing Mr. Trenkler's appeal for lack of jurisdiction. A-1. The court's order stated:

> This appeal is dismissed for lack of jurisdiction. We have held in United States v. Heller, 957 F.2d 26, 31 (1st Cir. 1992), that "reliance on the advice, statements, or actions of court employees cannot trigger the [unique circumstances] doctrine, whether appellant is or is not pro se." Heller is not an old case, and counsel does not point to any radical shift in the case law of other circuits, or of the Supreme Court, which would lead a panel of this court to depart from earlier circuit precedent. Accordingly, we adhere to our view expressed in Heller.

BASIS OF JURISDICTION

The court of appeal issued its judgment on April 6, 2001. A-1. The ninetieth day falls on July 5, 2001. Thus, the petition is timely filed if mailed on July 5, 2001. This Court has jurisdiction to review final judgments of the courts of appeals in criminal cases pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED IN THE CASE

Rule 4(b)(1)(A) of the Federal Rules of Appellate Procedure provides:

> (b) Appeal in a Criminal Case.
>
> (1) Time for Filing a Notice of Appeal.
>
> (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:
>
> (i) the entry of either the judgment or the order being appealed; or,
>
> (ii) the filing of the government's notice of appeal.

Rule 4(b)(4) of the Federal Rules of Appellate Procedure provides:

> (4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

STATEMENT OF THE CASE

The petitioner Alfred Trenkler was indicted on December 16, 1992, and charged with conspiracy, 18 U.S.C. § 371, receipt of explosive material, 18 U.S.C. § 844(d), and attempted malicious destruction of property by means of explosives, 18 U.S.C. § 844(i). On November 29, 1993, a jury returned guilty verdicts on all counts. A-5. The district court sentenced Mr. Trenkler to life in prison. Judgment entered on March 10, 1994. A divided court of appeals affirmed the convictions. *United States v. Trenkler*, 61 F.3d 45 (1st Cir. 1995).

On August 10, 2000, Mr. Trenkler filed a Motion for a New Trial. A-8. The motion asserted that the Trenkler's counsel had recently unearthed important new evidence establishing that Mr. Trenkler was entitled to a new trial. Specifically, petitioner averred that evidence had been uncovered that a receipt for a switch at Radio Shack for an item that was supposedly used to construct a bomb had been fabricated. In addition, the petitioner averred that the petitioner's co-defendant, one Thomas Shay, had recently told petitioner's counsel that Mr. Trenkler was not involved in the bombing. Finally, petitioner averred that a witness had been discovered who undermined the testimony of a jailhouse informant who testified against petitioner at trial.

On December 28, 2000, the district court, Zobel, J., denied the new trial motion. A-5. Judge Zobel held that the new trial motion was untimely because, under the pre-1999 version of Fed. R. Crim. P. 33, the two year period for filing a new trial motion, running from the date of final judgment, had expired, and under the 1999 version of Rule 33, the motion was filed more than three years after the verdict. The district judge also

rejected the motion on its merits, finding that the latter two grounds were unsupported by affidavit, while the first ground was available at the time of trial.

The defendant was shortly thereafter notified that his attorney, Morris M. Goldings, had become disabled and retired from the firm. A-23, 27. Mr. Goldings was a prominent criminal defense attorney in Boston, and it was widely reported that he was suspected of having stolen millions of dollars from his clients. The defendant was advised that he would be represented by Bruce Edmands, who had practiced law with Mr. Goldings. On January 2, 2001, Mr. Edmands told Jack Wallace, the defendant's step-father, that he would protect the defendant's right to appeal the denial of the new trial motion. Mr. Edmands also expressed his desire to meet with Mr. Wallace, but stated that he was unable to do so because he was busy with the chaos resulting from Mr. Goldings' departure.

On January 5, 2001, Mr. Edmands sought a thirty day extension of time in which to file the notice of appeal from the denial of the new trial motion. A-14. On January 8, 2001, Mr. Edmands filed a brief for Mr. Trenkler in an appeal from the denial of a federal habeas petition. *Trenkler v. United States*, United States Court of Appeals for the First Circuit No. 00-1657. A-24. That appeal is still pending.

On January 22, 2001, Judge Zobel allowed the motion to enlarge the time for filing the notice of appeal by thirty days. A-15. Mr. Edmands sent a copy of the allowed motion to Mr. Wallace, and told Mr. Wallace that he should seek other counsel for his step-son. On January 29, 2001, Mary Cummings, Courtroom Supervisor of the district court, told Mr. Wallace that the time for filing the notice of appeal would begin running when the allowance of the motion was docketed,

and said that the allowance had not been docketed. On February 2, 2001, Lisa Urso, Judge Zobel's deputy clerk, told Mr. Wallace that the allowed motion had been docketed on February 1, and that the notice of appeal was due no later than 30 days after February 1. Has he been told that the notice of appeal was due on February 6, Mr. Wallace would have hired an attorney by that date to file the notice of appeal. Mr. Wallace is not an attorney, and he has no legal training. Over the years, he had tried to assist his step-son by retaining and communicating with his attorneys. A-22-25.

New counsel was retained on February 11, 2001, A-25, and the Notice of Appeal was filed on February 20, 2001. A-16.

On March 14, 2001, the court of appeals questioned whether it had jurisdiction, and invited a response from Mr. Trenkler. A-3. That response was filed on March 28, 2001. A-17. In the response, petitioner sought refuge in the doctrine of unique circumstances. *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 386-87 (1964) (per curiam); *Osterneck v. Ernst & Whinney,* 489 U.S. 169 (1989). Petitioner noted that there is a split in the circuits over whether the doctrine applies in circumstances where the erroneous advice was given by personnel from the clerk's office, as opposed to the district judge herself. *Compare Willis v. Newsome*, 747 F.2d 605 (11th Cir. 1984), and *Hollins v. Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999) (holding that the doctrine may be triggered by errors committed by clerk's office), with *United States v. Heller*, 957 F.2d 26 (1st Cir. 1992) (holding that the erroneous advice must be rendered by the district judge herself).

The court of appeals dismissed the appeal on April 6, 2001,

finding that the Notice of Appeal was untimely. A-1.

REASONS FOR GRANTING PETITION

This Court Should Resolve the Circuit Split Between the First and Eleventh Circuits by Deciding That the Doctrine of Unique Circumstances Is Not Limited to Occasions When Erroneous Statements by a District Judge Lead to the Late-filing of a Notice of Appeal, but Can Also Be Triggered by Erroneous Advice Rendered to Pro Se Litigants by Clerk's Office Personnel.

The deadline for filing a notice of appeal is jurisdictional. It is, however, subject to the doctrine of unique circumstances. In *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 386-87 (1964) (per curiam), the Court permitted a litigant to pursue post-trial motions that had been served in an admittedly untimely manner, thereby defeating jurisdiction. The Court held that the litigant's reliance on the District Court's explicit statements that the motions were timely, and the fact that the litigant could have cured the problem had a question been raised, were "unique circumstances" that warranted relief.

In *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), the Court again addressed the doctrine. While declining to apply the *Thompson* doctrine, the Court reiterated its vitality:

> By its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done.

489 U.S. at 179.

In *United States v. Heller*, 957 F.2d 26 (1st Cir. 1992), the First Circuit recognized that there is a split among the courts of appeals as to whether the misleading statement must be made by a judge, or whether it could also be made by a person from the clerk's office. The court held that the misstatement must be made by a judge.

The Eleventh Circuit, on the other hand, applies the doctrine to statements by clerk's office personnel. *Willis v. Newsome*, 747 F.2d 605 (11th Cir. 1984); *Hollins v. Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999). The First Circuit gives the *Thompson* doctrine a narrow reading, while the Eleventh Circuit gives it a liberal reading. *Cf. Heller*, 957 F.2d at 31, with *Hollins*, 191 F.3d at 1327. *See also Schwartz v. Pridy*, 94 F.3d 453 (8th Cir. 1996) (applying doctrine of unique circumstances when clerk's office mistakenly returned a notice of appeal because one had prematurely been filed); *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981 (5th Cir, 1992) (applying doctrine where clerk's office sent incorrectly dated notice that was relied upon by litigants)

The Court should use this case as a vehicle for reexamining its attitude towards this doctrine. Specifically, the Court should decide whether erroneous advice by clerk's office personnel to a pro se litigant can trigger the doctrine of unique circumstances. This is an equitable doctrine, designed to ameliorate the unfairness that can arise when incorrect advice is given to a litigant by judicial personnel. It is particularly appropriate to apply the doctrine where the court system is dealing with a pro se litigant, because pro se litigants often rely upon information they glean from court personnel, and they are

often unable to discover that they have been given incorrect advice.

The prevalence of pro se litigants has increased in recent years as the costs of litigation spiral upwards. While calculating the effect of a post-trial motion on the deadline for filing a notice of appeal may seem like a simple matter for an attorney or a judicial officer, a pro se litigant often runs afoul of the applicable rules. In these circumstances, where a pro se litigant detrimentally relies upon the advice of a judicial officer, it is appropriate and fair to excuse that litigant's misunderstandings.

This case is a vivid demonstration of the need for equity to ease the harsh result that would otherwise obtain. Mr. Wallace was advised by two high-level officials of the clerk's office that the time for filing the notice of appeal would begin to run once the judge's allowance of the motion to enlarge had been docketed. That advice appeared to come from the judge herself. Indeed, one of the officials was the district judge's courtroom clerk. To the public, and to pro se litigants, such high-ranking personnel of the clerk's office speak with the apparent imprimatur of the court itself.

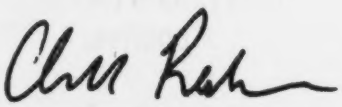
Here there are important equitable factors favoring relief. The defendant was left in the lurch created by his lawyer's disability. His step-father, Jack Wallace, set out to retain new counsel for the defendant, who is incarcerated. Mr. Wallace was assured by two ranking members of the district court's clerk's office – the Courtroom Supervisor and Judge Zobel's courtroom deputy – that the time for filing a notice of appeal would expire thirty days after the docketing of the judge's order allowing an extra thirty days to file the notice of appeal. Reliance on that advice was reasonable, and indeed it appeared

to come directly from the judge herself. Moreover, it was given at a time when it would have been possible to file a timely notice of appeal if proper advice had been given. Mr. Wallace was told by clerk's office personnel on January 30 and February 2 that he had at least until the end of February. Under the law, the time to appeal expired on February 6, 2001. In these circumstances, the doctrine of unique circumstances should be applied.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted
The petitioner Alfred Trenkler
By his attorneys



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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 01-1323

UNITED STATES,
Appellee,

v.

ALFRED W. TRENKLER,
Defendant, Appellant.

Before

Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
and Stahl, Circuit Judge.

JUDGMENT
Entered: April 6, 2001

This appeal is dismissed for lack of jurisdiction. We have held in United States v. Heller, 957 F.2d 26, 31 (1st Cir. 1992), that "reliance on the advice, statements, or actions of court employees cannot trigger the [unique circumstances] doctrine,

whether appellant is or is not pro se." Heller is not an old case, and counsel does not point to any radical shift in the case law of other circuits, or of the Supreme Court, which would lead a panel of this court to depart from earlier circuit precedent. Accordingly, we adhere to our view expressed in Heller.

By the Court:

PHOEBE MORSE
Clerk.

[Cert Copy to Judge Harrington and Tony Anastas, Clerk, DCMA]

cc: Messrs. Goldings, Sultan, Rankin, McGrath and Chaitowitz]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-1323

UNITED STATES,
Appellee,

v.

ALFRED W. TRENKLER,
Defendant-Appellant.

ORDER OF THE COURT
Entered: March 14, 2001

Upon review of the record in this case, it appears that this court may not have jurisdiction to consider this appeal. The defendant-appellant's notice of appeal, filed on February 20, 2001 in CR. No. 92-10369 (D. Mass.), from an order that entered on December 28, 2000, is late. Fed. R. App. P. 4(b) (notice of appeal in criminal case must be filed within ten days of the judgment or order appealed from). While the district court enlarged the time to file the notice of appeal by its [January] 22, 2001 endorsed order, the Fed. R. App. P. (4)(b)(4) only permits the district court to extend the time for filing a notice of appeal for 30 days after the expiration of the original 10 day period. U.S. v. Josleyn, 206 F.3d 144, 150 (1st Cir. 2000). The maximum time in which to file a timely notice of appeal, or forty days from entry of the order, expired on

February 7, 2001.

Accordingly, it is hereby ordered that defendant-appellant either move for voluntary dismissal under Fed. R. App. P. 42(b) or show cause, in writing why this appeal should not be dismissed. The failure to take either action by **March 28, 2001**, may lead to dismissal of the appeal for failure to prosecute.

By the Court:
Phoebe Morse, Clerk

By JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Goldings, Sultan, Rankin, McGrath and Chaitowitz]

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 92-10369-RWZ

UNITED STATES OF AMERICA,
Plaintiff

v.

ALFRED W. TRENKLER
Defendant

MEMORANDUM OF DECISION

December 28, 2000

ZOBEL, D.J.

Defendant, Alfred W. Trenkler, was convicted by a jury on November 29, 1993 of conspiracy and two substantive "explosives" counts under 18 U.S.C. § 844. Judgment entered on March 8, 1994 and was affirmed by the Court of Appeals on July 18, 1995. The matter is before me on defendant's Motion for a New Trial or, in the Alternative, for an

Evidentiary Hearing, the fourth attack on the judgment.[1] Defendant again cites evidence he alleges is newly discovered. He asserts that records of Radio Shack show that the government fabricated a receipt from its store on Massachusetts Avenue in Boston for the sale to Thomas Shay of components of the bomb; that Mr. Shay, the co-defendant, would testify that Mr. Trenkler did not commit the offense of which he stands convicted; and that another witness, John J. Bowden, would offer testimony concerning the veracity of a trial witness, David Lindholm.

The motion for a new trial fails on the merits and an evidentiary hearing would not cure its essential weakness. Apart from the fact that the records of Tandy Corporation, the parent of Radio Shack, show the purchase defendant contests,

---

[1] On December 22, 1995, defendant filed the first motion for a new trial under Fed. R. Crim. P. 33 on the ground of newly discovered evidence; namely, the testimony of a Dr. Robert Phillips, a psychiatrist who opined on the credibility of Thomas Shay, the co-defendant, and an alleged agreement for leniency of a government witness, David Lindholm.

In November 1996, defendant moved for a Judicial Inquiry into Possible Juror Misconduct and for a New Trial.

On January 5, 1999, defendant filed a motion under 28 U.S.C. § 2255 to vacate the judgment on the ground of ineffective assistance of his retained trial counsel because of counsel's failure to call Dr. Phillips.

All three motions were denied and the denial of the first two, affirmed on appeal. The third is still pending.

the evidence he cites was available at the time of the trial. The allegedly exculpatory statements of Thomas Shay and John Bowden are unsupported by any affidavits and, in the case of Mr. Shay, directly contradict his sworn testimony at his change of plea hearing.

In the end, however, the motion fails because it is simply too late. Current Rule 33, as amended in 1999, provides that "[a] motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty." Former Rule 33 granted a two-year period for filing a motion for a new trial and the time ran from the date of final judgment. Whichever version of the Rule governs, the motion, filed in August 2000, is untimely as it was filed more than three years after the verdict, November 1993, and more than two years after the date of the mandate from the Court of Appeals, July 1995.

The motion for a new trial is denied.

December 28, 20000 /s/
DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 92-10369-Z

UNITED STATES OF AMERICA

v.

ALFRED W. TRENKLER,
Defendant

DEFENDANT ALFRED W. TRENKLER'S MOTION FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, FOR AN EVIDENTIARY HEARING

Pursuant to Fed. R. Crim. P. 33, the Defendant Alfred W. Trenkler ["Trenkler"], who is currently serving a sentence of life imprisonment, hereby moves this Court to set aside the verdict returned in the above-entitled action on November 29, 1993 (and the judgment entered thereon on March 8, 1994) and to grant a new trial on the grounds of newly discovered evidence. In the alternative, the defendant requests an evidentiary hearing relating to certain newly discovered evidence. As reasons therefor, the Defendant asserts the following:

(1) In late October and November 1993, Trenkler was tried

by a jury for conspiracy under 18 U.S.C. § 371, receipt of explosive material under 18 U.S.C. § 844(d), and attempted malicious destruction of property by means of explosive under 18 U.S.C. § 844(I) arising out of an explosion in Roslindale, Massachusetts, on October 28, 1991, which killed a Boston Police officer and seriously injured a second Boston Police officer. Trenkler was convicted on November 29, 1993, and sentenced to concurrent terms of imprisonment for life on the counts of receipt of explosive materials and attempted malicious destruction of property by means of explosives and for sixty months on the count of conspiracy by a judgment of conviction entered on March 8, 1994.

(2) The hallmark question in the case against Trenkler was the identity of the creator of the Roslindale bomb. Trial Transcript, pp. 162, 229. There was no direct physical evidence linking Trenkler to the 1991 bomb. Trial Transcript, pp. 910, 944-945.

(3) As a result of the appeal of Trenkler's conviction, the First Circuit Court of Appeals in United States v. Alfred W. Trenkler, No. 94-1301, found that this Court erred in admitting certain computer-derived evidence under the residual exception to the hearsay rule to prove the identity of the creator of the Roslindale bomb, but nonetheless found the error harmless beyond a reasonable doubt. The testimony of a government witness David Lindholm was crucial to upholding the conviction. There was a strong and lengthy dissent by Chief Judge Torruella.

(4) The Defendant was not aware at the time of the trial of

this action in October and November 1993, of the following newly discovered evidence:

(1) At the trial of this case, the United States introduced into evidence a certain receipt and other evidence concerning the alleged purchase at a Radio Shack facility in Boston Massachusetts of a certain item by the Defendant, Alfred W. Trenkler.

(2) Inquiry made on behalf of the Defendant with the Radio Shack corporation has demonstrated that the receipt was fabricated and did not correspond to the testimony offered by the United States on this subject.

(3) That testimony was critical to the prosecution of this case and without it, it is likely that the jury would not have reached a verdict against the Defendant, Alfred W. Trenkler.

(4) An interview with Thomas A. Shay, who was indicted with the Defendant, Alfred W. Trenkler, and was tried separately and before Alfred W. Trenkler by Morris M. Goldings, Esquire at Shay's place of incarceration at the McKeen County Correctional Facility in Bradford, Pennsylvania has resulted in statements by Shay that the testimony by the Radio Shack employee concerning the purchaser of the items was false and biased. The interview also yielded a statement by Thomas A. Shay that Alfred W. Trenkler did not commit the crimes for which he has been convicted.

(5) Thomas A. Shay has on previous occasions stated

to other persons known to the United States that Alfred W. Trenkler did not commit the crimes for which he has been convicted.

(6) An additional witness concerning the veracity of the testimony of David Lindholm has come forward and has offered to testify as to that crucial guilt witness. His name is John J. Bowden and he is presently incarcerated in Allenwood Federal Correctional Institute.

(7) A hearing is necessary in order to produce the evidence demonstrating the falsity of the Radio Shack evidence and the exculpating testimony of Thomas A. Shay, and further evidence concerning the veracity of the witness Lindholm and consequently, a Petition for Writ of Habeas Corpus Ad Testificandum is filed herewith with respect to Thomas A. Shay and a similar Petition for a Writ is filed herewith with respect to John J. Bowden.

(8) An affidavit of Robert W. Blair, Associate General Counsel – Litigation for Tandy Corporation, which owns and operates over 5,000 Radio Shack stores throughout the United States, states:

(1) I am Associate General Counsel – Litigation for Tandy Corporation which owns and operates over 5,000 Radio Shack stores throughout the United States.

(2) I have cause [sic] to be made a search for and examination of certain business records of the Radio Shack Division, specifically the general

journal printout for Radio Shack store No. 01-1021 located at 197 Massachusetts Avenue, Boston, Massachusetts for the date of October 18, 1991.

(3) I have also examined sales receipt No. 098973 a copy of which is attached to this Affidavit.

(4) Based upon my examination of these documents and my knowledge of the business practices of Radio Shack stores, other than the store address and number, none of the information on sales receipt No. 098973 matches any information contained in Radio Shack's general journal for store No. 01-1021 on October 18, 1991.

(A copy of Attorney Blair's Affidavit and the sales receipt attached thereto are attached hereto and marked Attachment "A.")

WHEREFORE, the Defendant Alfred W. Trenkler respectfully requests that this Court grant his Motion for a New Trial or, in the Alternative, for an Evidentiary Hearing.

CERTIFICATION UNDER LOCAL RULE 7.1(A)(2)

The undersigned hereby certifies that counsel for the Defendant has attempted in good faith to resolve the issues surrounding this motion with counsel for the government.

Dated: 8/10/00 /s/
Morris M. Goldings

By his Attorney,

/s/

Morris M. Goldings
BBO #198800
MAHONEY, HAWKES & GOLDINGS, LLP
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(617) 457-3100

Dated August 10, 2000

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Action Number 92-10369-Z

UNITED STATES OF AMERICA,
Plaintiff

v.

ALFRED W. TRENKLER,
Defendant

MOTION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE NOTICE OF APPEAL

Alfred W. Trenkler, the defendant in the above-captioned case, hereby requests an extension of time thirty (30) days within which to file a Notice of Appeal from the order of the District Court denying his motion for new trial as time-barred, entered in this action on or about December 28, 2000.

As stated in the accompanying Affidavit of Bruce W. Edmands, Esquire, a partner in the law firm of Mahoney Hawkes LLP, attached hereto and incorporated herein, good cause for an extension is shown by the fact that Morris M. Goldings, who has represented the defendant Alfred W. Trenkler in the above-captioned case, has become disabled and hospitalized and is no longer able to represent the defendant.

The request for an extension of time to file a Notice of Appeal in the above-captioned case is requested so that the defendant can decide whether this firm or other counsel will represent him.

Filed January 5, 2001

Allowed Rya W. Zobel 1/22/01

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CRIMINAL #92-10369-RWZ

UNITED STATES OF AMERICA
v.
ALFRED W. TRENKLER

NOTICE OF APPEAL

Alfred W. Trenkler, defendant in the above-captioned criminal case, hereby appeals to the United States Court of Appeals for the First Circuit from the decision of this Court dated December 28, 2000 denying his motion for a new trial.

Respectfully submitted,
ALFRED W. TRENKLER
By his attorneys,

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(617) 720-0011

February 20, 2001

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-1323

UNITED STATES OF AMERICA,
Appellee

v.

ALFRED W. TRENKLER,
Defendant/Appellant

MEMORANDUM REGARDING COURT'S ORDER OF MARCH 14, 2001 REGARDING TIMELINESS OF APPEAL

The defendant/appellant Alfred W. Trenkler submits this Memorandum in response to the Court's March 14, 2001 Order regarding whether the notice of appeal was timely filed. The defendant-appellant is submitting herewith the Affidavit of Jack Wallace. In this Memorandum, the defendant contends that the Court should permit the appeal to go forward because of the doctrine of "unique circumstances."

The district court denied the defendant's new trial motion on December 28, 2000. The defendant was shortly thereafter notified that his attorney, Morris M. Goldings, had become disabled and retired from the firm. The defendant was advised

that he will be represented by Bruce Edmands. On January 2, 2001, Mr. Edmands told Jack Wallace, the defendant's step-father, that he would protect the defendant's right to appeal the denial of the new trial motion. Mr. Edmands also expressed his desire to meet with Mr. Wallace, but stated that he was unable to do so because he was busy with the chaos resulting from Mr. Goldings' departure. On January 5, 2001, Mr. Edmands sought a thirty day extension of time in which to file the notice of appeal from the denial of the new trial motion. On January 8, 2001, Mr. Edmands filed a brief for Mr. Trenkler in an appeal from the denial of a federal habeas petition. *Trenkler v. United States*, United States Court of Appeals for the First Circuit No. 00-1657.

On January 22, 2001, Judge Zobel allowed the motion to enlarge the time for filing the notice of appeal by thirty days. Mr. Edmands sent a copy of the allowed motion to Mr. Wallace, and told Mr. Wallace that he should seek other counsel for his step-son. On January 29, 2001, Mary Cummings, Courtroom Supervisor of the district court, told Mr. Wallace that the time for filing the notice of appeal would begin running when the allowance of the motion was docketed, and said that the allowance had not been docketed. On February 2, 2001, Lisa Urso, Judge Zobel's deputy clerk, told Mr. Wallace that the allowed motion had been docketed on February 1, and that the notice of appeal was due no later than 30 days after February 1. Has he been told that the notice of appeal was due on February 6, Mr. Wallace would have hired an attorney by that date to file the notice of appeal.

Mr. Wallace hired new counsel on February 11, 2001, and new counsel filed a notice of appeal on February 20, 2001.

(a) The Court Should Permit the Appeal to Go Forward Because of the Doctrine of Unique Circumstances.

The deadline for filing a notice of appeal is jurisdictional. It is, however, subject to the doctrine of unique circumstances. In *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 386-87 (1964) (per curiam), the Supreme Court permitted a litigant to pursue post-trial motions that had been served in an admittedly untimely manner, thereby defeating jurisdiction. The Court held that the litigant's reliance on the District Court's explicit statements that the motions were timely, and the fact that the litigant could have cured the problem had a question been raised, were "unique circumstances" that warranted relief.

In *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), the Court again addressed the doctrine. While declining to apply the *Thompson* doctrine, the Court reiterated its vitality:

> By its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done.

489 U.S. at 179.

In *United States v. Heller*, 957 F.2d 26 (1st Cir. 1992), recognized the continuing viability of the doctrine. It explained that the appellate court is the proper forum to determine whether to apply the doctrine, although it recognized that it might be appropriate to remand the matter to the trial court for fact findings. 957 F.2d at 28.

The Court recognized that there is a split among the courts of appeals as to whether the misleading statement must be made by a judge, or whether it could also be made by a person from the clerk's office. The Court held that the misstatement must be made by a judge. The Eleventh Circuit, on the other hand, applies the doctrine even to statements by clerk's office personnel. *Willis v. Newsome*, 747 F.2d 605 (11th Cir. 1984); *Hollins v. Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999). This Circuit gives the *Thompson* doctrine a narrow reading, while the Eleventh Circuit gives it a liberal reading. *Cf. Heller*, 957 F.2d at 31, with *Hollins*, 191 F.3d at 1327.

The Court should use this case as a vehicle for reexamining its attitude towards this doctrine. Here there are important equitable factors favoring relief. The defendant was left in the lurch created by his lawyer's disability. His step-father set out to retain new counsel for the defendant, who is incarcerated. Mr. Wallace was assured by two ranking members of the district court's clerk's office – the Courtroom Supervisor and Judge Zobel's courtroom deputy – that the time for filing a notice of appeal would expire thirty days after the docketing of the judge's order allowing an extra thirty days to file the notice of appeal. Reliance on that advice was reasonable, and indeed it appeared to come directly from the judge herself. Moreover, it was given at a time when it would have been possible to file a timely notice of appeal if proper advice had been given. Under the law the time to appeal expired on February 6, 2001. Mr. Wallace was told by clerk's office personnel on January 30 and February 2 that he had at least until the end of February. In these circumstances, the doctrine of unique circumstances should be applied. In the alternative, the Court should remand the matter for fact-finding by Judge Zobel.

Respectfully submitted
The defendant/appellant Alfred Trenkler
By his attorneys

/s/
Charles W. Rankin, BBO No. 411780
James L. Sultan
Rankin & Sultan
1 Commercial Wharf North
Boston, MA 02110
(617) 720-0011

CERTIFICATE OF SERVICE

I certify that I have served the foregoing by delivering a copy to AUSA Dina M. Chaitowitz on March 28, 2001

/s/
Charles W. Rankin

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-1323

UNITED STATES OF AMERICA,
Appellee

v.

ALFRED W. TRENKLER,
Defendant/Appellant

AFFIDAVIT OF JACK WALLACE

Jack Wallace, being duly sworn according to law, hereby deposes and says as follows:

1. My name is Jack Wallace. I am the stepfather of defendant/appellant Alfred W. Trenkler. I am not an attorney and I do not have legal training. My stepson is incarcerated at USP-Allenwood, where he is serving a life sentence. In the years since his conviction, I have tried to assist him by helping him obtain counsel and by staying in regular communication with his attorneys.

2. Attorney Morris M. Goldings had represented my son on his direct appeal and on various post-conviction matters for

many years. Mr. Goldings had litigated a new trial motion that was filed in August 2000 before Judge Zobel. On Saturday, December 30, 2000, I learned that Judge Zobel had denied the new trial motion by reading an article in *The Boston Globe*. A copy of the article is attached as Exhibit 1.

3. At some point during the long holiday weekend between December 30, 2000 and January 1, 2001, I learned by talking on the telephone to my stepson that he had received a letter from James B. Cox, Managing Partner of Mahoney, Hawkes & Goldings. A copy of that letter is attached hereto as *Exhibit A*. The letter informed my stepson that Mr. Goldings had become disabled and retired from the firm. The letter indicated that my stepson would hereafter be represented by Bruce Edmands of the Mahoney, Hawkes & Goldings firm.

4. On January 2, 2001, I attempted to reach Morris Goldings. On that date, I was unable to speak with Mr. Goldings, but I did speak with Mr. Edmands. Mr. Edmands advised me that he would be handling Alfred's case. He wanted to meet with me, but would be unable to meet with me for at least another week because of the chaos in the firm created by Mr. Goldings' departure. He promised to send me a copy of the letter he had sent to my step-son, and he told me that he would file a motion with Judge Zobel to protect my step-son's rights regarding the new trial motion. I received a copy of the letter sent to my son on January 5, 2001.

5. On January 3, 2001, I called Lisa Urso, Deputy Clerk to Judge Zobel, to request a copy of the Memorandum of Decision because the Mahoney, Hawkes & Goldings firm

had not received it. . She was kind enough to fax it to me.

(f) The firm of Mahoney, Hawkes & Goldings was also representing my son in an appeal from the denial of a federal *habeas* petition pursuant to 28 U.S.C. § 2255. *Alfred W. Trenkler v. United States*, U.S. Court of Appeals for the First Circuit No. 00-1657. Mr. Edmands and Mr. Jacobs from Mahoney, Hawkes & Goldings filed a brief in that appeal on my stepson's behalf on January 8, 2001.

7. During the week of January 22, 2001, I spoke to Mr. Edmands. He was still unable to meet with me because he was busy with the problems created by Mr. Goldings' departure. He advised me that we should retain new counsel because there could be a conflict-of-interest if the Mahoney, Hawkes & Goldings firm continued to represent my stepson.

(8) On January 22, 2001, Judge Zobel allowed Mr. Edmands' motion for extension of time in which to file the notice of appeal. I learned of that decision a couple of days later when I received a copy of the endorsed motion from Mr. Edmands. To this day I have never met Mr. Edmands.

(9) On January 29, 2001, I spoke with Mary Cummings, Courtroom Supervisor of the District Court Clerk's Office, to clarify when the 30-day extension of time began running. Ms. Cummings informed me that the 30 days to file a notice of appeal would commence when the order allowing the extension was docketed. She informed me that it had not yet been docketed.

(10) On February 2, 2001, I spoke with Lisa Urso, Deputy Clerk to Judge Zobel. Ms. Urso told me that she had

docketed the motion on February 1st and that the 30-day extension of time would begin running on that day.

(11) If I had been told by Ms. Cummings or Ms. Urso that the deadline for filing the notice of appeal was February 6, 2001, I would have had an attorney file the notice of appeal in a timely fashion.

(12) On February 11, 2001, I hired the firm of Rankin & Sultan to represent my stepson. That firm filed a notice of appeal on my stepson's behalf in this matter on February 20, 2001.

Signed and sworn to under the pains and penalties of perjury this 28th day of March 2001.

/s/
Jack Wallace

THE BOSTON GLOBE SATURDAY, DECEMBER 30, 2000

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in brief

BOSTON

Convicted 1991 bomber loses bid

A federal judge has rejected a bid by convicted bomber Alfred Trenkler for a new trial, saying it was filed too late. Trenkler, serving a life sentence for building a bomb in 1991 that killed Boston Police Bomb Squad technician Jeremiah Hurley and maimed his partner, Francis X. Foley, contended that federal agents fabricated a receipt introduced as evidence during his trial. Federal agents said corporate records disprove the allegation, but US District Court Judge Rya W. Zobel ruled the point was moot because Trenkler's motion was filed at least two years too late under federal court rules.

EXHIBIT 1

December 29, 2000

Mr. Alfred W. Trenkler
#19377-038
USP Allenwood
PO Box 3000
White Deer, PA 17887

Dear Mr. Trenkler:

I write to inform you that our partner, Morris Goldings, has very recently become disabled. His condition prevents him from practicing law, and he has retired from the Firm. For that reason, we must advise you that Morris has no authority to act in any capacity on behalf of this law firm. We regret this news, and we wish Morris well.

We have arranged to have another partner of our firm experienced in this area, Bruce Winthrop Edmands, assume responsibility for each matter of yours that is now pending. That partner will be directly responsible for the matter unless you advise me that you prefer some other arrangement. Bruce Winthrop Edmands will be in touch with you very soon to discuss this transition.

I regret any inconvenience this unexpected announcement may cause you. I also wish to assure you that we are fully capable and desirous of continuing to represent your interests

effectively and immediately. We very much appreciate the opportunity to serve you and hope you will permit us to continue to do so.

Please feel free to telephone me with any concerns you may have, and please accept our best wishes for a healthy and prosperous New Year.

Very truly yours,

James B. Cox
Managing Partner

JBC/dmh:67479

EXHIBIT A

No. 01-25

In the Supreme Court of the United States

ALFRED W. TRENKLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's appeal as untimely, where petitioner failed to follow the clear language of Federal Rule of Appellate Procedure 4(b) governing the timing for filing notices of appeal and instead allegedly relied on incorrect advice from district court employees.

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In the Supreme Court of the United States

No. 01-25

ALFRED W. TRENKLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) dismissing petitioner's appeal for lack of jurisdiction is unreported. The opinion of the district court (Pet. App. A5-A7) denying petitioner's motion for a new trial as untimely is also unreported.

JURISDICTION

The judgment of the court of appeals was entered April 6, 2001. The petition for a writ of certiorari was filed July 5, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted of receipt of explosives with knowledge that they would be used against persons and

property, in violation of 18 U.S.C. 844(d); malicious destruction of property by means of explosives, in violation of 18 U.S.C. 844(i); and conspiracy, in violation of 18 U.S.C. 371. He was sentenced to life imprisonment and the court of appeals affirmed. 61 F.3d 45 (1995). Petitioner subsequently filed two motions for a new trial and a motion to vacate his conviction under 28 U.S.C. 2255 (1994 & Supp. V 1999). Pet. App. A6. The district court denied all three motions, the court of appeals affirmed the denial of both new trial motions, and petitioner's appeal of the denial of his Section 2255 motion is still pending. *Ibid.*

1. Petitioner built a bomb intended for use against a friend's father. The bomb was placed in the intended victim's driveway, and it exploded on October 28, 1991, while Boston police officers were inspecting it. The blast killed one officer and seriously injured another. 61 F.3d at 47-48.

Following a massive investigation, petitioner and the intended victim's son were arrested. Petitioner was tried before a jury in the United States District Court for the District of Massachusetts. He was convicted on November 29, 1993, and the district court entered judgment against him on March 8, 1994. Pet. App. A5.

2. More than six years after the jury returned its verdict, petitioner filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33, asserting that he had newly discovered evidence. Pet. App. A8-A12. As we have noted, the motion was preceded by several other unsuccessful attempts by petitioner to overturn his conviction. Petitioner now claims to have discovered evidence revealing that the government introduced a fabricated document at trial; that his co-defendant would testify at a hearing that petitioner did not commit the offenses for which he was

convicted; and that another witness would testify about the lack of veracity of a trial witness who testified against petitioner. *Id.* at A10-A11.

The district court denied the motion on December 28, 2000. Pet. App. A5-A7. As to the merits, the district court found that the "newly discovered" evidence had been available at the time of the trial and that the purported exculpatory witness statements were not supported by affidavits. *Id.* at A6-A7. Ultimately, however, the court denied petitioner's motion as untimely, concluding that

> In the end, * * * the motion fails because it is simply too late. * * * Whichever version of the Rule governs [current Rule 33 as amended in 1999 or former Rule 33], the motion, filed in August 2000, is untimely as it was filed more than three years after the verdict, November 1993, and more than two years after the date of the mandate from the Court of Appeals, July 1995.

Id. at A7.

On January 5, 2001, petitioner sought a 30-day extension of time to file his notice of appeal from the district court's denial of his Rule 33 motion. That request, supported by an affidavit from a partner of petitioner's lawyer, stated that petitioner's counsel had become disabled and that petitioner needed additional time to determine whether to have the same law firm continue its representation or whether to obtain new counsel. Pet. App. A14-A15. The district court granted the motion on January 22, 2001. *Id.* at A15.

According to an affidavit of Jack Wallace, petitioner's stepfather, two of the district court's employees advised him concerning the new filing date. In particular, Wallace claims that on January 29, 2001, a courtroom

supervisor told him that the notice of appeal had to be filed within 30 days from the date on which the district court's order granting the extension was docketed, which had not yet occurred. Pet. App. A24. Wallace also alleges that on February 2, 2001, the district judge's deputy clerk told him that the "motion" had been docketed on February 1, and that "the 30-day extension of time would begin running on that day." *Id.* at A24-A25. Petitioner filed a notice of appeal on February 20, 2001—54 days after the entry of the order from which he was appealing. *Id.* at A16.

3. On March 14, 2001, the court of appeals advised petitioner that his appeal might be dismissed due to lack of appellate jurisdiction. The court's order acknowledged that the district court had granted petitioner's motion to extend the filing deadline, but observed that, under Federal Rule of Appellate Procedure 4(b)(4), such an order extended the filing deadline only to 30 days beyond the expiration of the original ten-day period. The court of appeals ordered petitioner either to move for voluntary dismissal or to show cause why the appeal should not be dismissed. Pet. App. A3-A4.

Petitioner responded by asking the court to accept the untimely notice of appeal under the doctrine of "unique circumstances." Pet. App. A17-A21. The court of appeals declined to do so, following *United States* v. *Heller*, 957 F.2d 26, 31 (1st Cir. 1992), which held that "reliance on the advice, statements, or actions of court employees cannot trigger the [unique circumstances] doctrine whether appellant is or is not pro se." Pet. App. A1-A2 (quoting *Heller*, 957 F.2d at 31). The court therefore dismissed petitioner's appeal for lack of jurisdiction. *Id.* at A2.

ARGUMENT

Petitioner contends (Pet. 7-10) that this Court should grant certiorari to resolve a conflict between the circuits as to whether the "unique circumstances" doctrine, which in some circumstances has been applied to excuse a failure to file a timely notice of appeal, may be triggered by erroneous advice from a district court's employees. This case, however, does not implicate the purported division of circuit authority that petitioner identifies, as there is no reason to believe that it would have been resolved differently had it arisen in another circuit. In any event, petitioner would not prevail on his appeal because his motion for a new trial—filed more than six years after the verdict—was itself untimely and thus correctly denied.

1. Federal Rule of Appellate Procedure 4(b)(1)(A)(i) states that notices of appeal in criminal cases must be filed within ten days after the entry of the order being appealed. Upon a finding of good cause or excusable neglect, a district court may extend this time "for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Fed. R. App. P. 4(b)(4). In light of the district court's order granting petitioner's request for a 30-day extension, petitioner's notice of appeal was due no later than February 6, 2001, *i.e.*, 40 days after the district court's December 28, 2000 order denying his new trial motion. Petitioner, however, did not file a notice until February 20, 2001.

To salvage his untimely appeal, petitioner invokes the judicially created "unique circumstances" doctrine, which originated in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam). In *Harris*, the district court—acting before the initial time

for filing an appeal had run—granted the losing party an extension pursuant to Federal Rule of Civil Procedure 73(a) (now Federal Rule of Appellate Procedure 4(a)). The court of appeals dismissed the appeal, finding that the circumstances upon which the district court had relied to grant the extension did not constitute "excusable neglect." 371 U.S. at 216. This Court reversed, pointing to the great hardship to a party who, before the expiration of the period for taking an appeal, relies on a district court's finding of excusable neglect only to have that finding reversed later. The Court concluded that these facts constituted such "unique circumstances" that the court of appeals should not have disturbed the district court's decision to grant the extension. *Id.* at 217.

The Court extended the "unique circumstances" doctrine in *Thompson* v. *INS*, 375 U.S. 384 (1964) (per curiam). There, the district court erroneously told Thompson that his new trial motion had been made "in ample time," when it had in fact been filed two days late. After the motion was denied, Thompson—in reliance on the misinformation given him by the court —miscalculated the time for filing a notice of appeal of the underlying order. *Id.* at 385. The Seventh Circuit dismissed the appeal as untimely, *ibid.*, but this Court reversed, finding that "unique circumstances" placed the case "squarely within the letter and spirit of *Harris*." *Id.* at 387. The Court reasoned that Thompson had done an act (filing a new trial motion) which, if properly done, would postpone the deadline for filing a notice of appeal, and had relied on the district court's conclusion that the act had been properly done. *Ibid.* That same Term, the Court relied on *Thompson* in summarily reversing another court of appeals' dismissal

of an appeal. *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964) (per curiam).

More recent decisions by this Court, however, have stressed the limited nature of the "unique circumstances" doctrine, and have confirmed that "the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (quoting *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 264 (1978)). As the Court observed in *United States* v. *Locke*, 471 U.S. 84, 101 (1985): "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." The Court has correspondingly emphasized that the "unique circumstances" doctrine "applies *only* where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a *judicial officer* that this act has been properly done." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989) (emphasis added).

Accordingly, because petitioner's stepfather allegedly relied on erroneous statements made to him only by court employees, the court of appeals correctly concluded that any reliance would not be protected under that doctrine. Pet. App. A1-A2. Similar conclusions have been reached by most courts of appeals that have addressed this issue. See *Rezzonico* v. *H & R Block, Inc.*, 182 F.3d 144 (2d Cir. 1999), cert. denied, 528 U.S. 1189 (2000); *In re the Suspension of Pipkins*, 154 F.3d 1009 (9th Cir. 1998); *Moore* v. *South Carolina Labor Bd.*, 100 F.3d 162 (D.C. Cir. 1996); *Sonicraft, Inc.* v. *NLRB*, 814 F.2d 385 (7th Cir. 1987).

Petitioner argues that the unpublished decision in this case, and those of the Second, Seventh, Ninth, and D.C. Circuits, conflict with the Eleventh Circuit's more "liberal reading" (Pet. 8) of the "unique circumstances" doctrine. This case does not properly present that purported conflict, however, because there is no reason to believe that petitioner would have prevailed in *any* circuit. Petitioner does not merely seek to have the "unique circumstances" doctrine extended to permit reliance on statements by court employees; he also asks that litigants be permitted to rely even where such reliance is unreasonable because the statements are contrary to the clear text of the Federal Rules. Here, the Rules are clear that a notice of appeal in a criminal case must ordinarily be filed within ten days of the order being appealed, see Fed. R. App. P. 4(b)(1)(A)(i), and that a district court cannot extend this period beyond "30 days from the expiration of the time otherwise prescribed by this Rule," Fed. R. App. P. 4(b)(4). None of the cases on which petitioner relies suggest that the "unique circumstances" doctrine would excuse compliance with a jurisdictional deadline in such circumstances.

Two of the cases cited by petitioner presented the question whether litigants are entitled to rely upon the factual accuracy of the district court's records in determining when a notice of appeal would be due through otherwise proper application of the governing provisions of the Federal Rules of Appellate Procedure. In *Hollins* v. *Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999), the district court had entered an order against the appellant, but counsel for the appellant never received a copy of the order and the judicially maintained PACER system failed to reflect that it had been entered. The lawyer eventually learned of the

order and promptly filed a notice of appeal. *Id.* at 1325-1326. The Eleventh Circuit held that counsel was entitled to rely on the accuracy of the PACER system, and thus declined to dismiss the appeal as untimely. *Id.* at 1327. Similarly, in *Prudential-Bache Sec., Inc.* v. *Fitch*, 966 F.2d 981 (5th Cir. 1992), the appellant received a copy of the district court's order that was stamped as having been "ENTERED" 11 days before the order was actually entered on the court's docket. Relying on that date, the appellant filed a premature notice of appeal. *Id.* at 983-985. The Fifth Circuit declined to dismiss the appeal, holding that the appellant had been entitled to rely on the date stamp. *Id.* at 985-986.

Petitioner's reliance on *Swartz* v. *Pridy*, 94 F.3d 453 (8th Cir. 1996), is likewise misplaced. In that case, the district court clerk improperly refused to accept an appellant's timely notice of appeal. After the district court had entered a non-final order, the appellant had submitted a premature notice of appeal, which the clerk accepted. The court later entered a final order, and the appellant filed another notice of appeal. The clerk's office declined to accept the timely notice, stating that it had already received the appellant's earlier notice of appeal. *Id.* at 455. Faced with those facts (involving no default by the appellant), the Eighth Circuit refused to dismiss the appeal for lack of appellate jurisdiction. *Id.* at 456.[1]

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[1] Nor would petitioner prevail under the holding of *Willis* v. *Newsome*, 747 F.2d 605 (11th Cir. 1984) (per curiam)—a decision that preceded this Court's more recent jurisprudence on the subject. There, counsel for the appellant mailed rather than hand-delivered the notice of appeal in reliance on a statement by the district court clerk that "local custom" was to date such notices as having been filed on the date that they were mailed. The court of

Petitioner has cited no case in which any court has applied the "unique circumstances" doctrine to excuse an untimely notice of appeal where, as here, judicial employees allegedly misled a litigant as to the clear language of a Federal Rule. Petitioner needed only to consult Federal Rule of Appellate Procedure 4(b)(4) to learn that the district court's order extending his time to appeal ran from "the expiration of the time otherwise prescribed by this Rule 4(b)," *i.e.*, the ten days allowed for an appeal of an order in a criminal case. See Fed. R. App. P. 4(b)(1)(A)(i). Petitioner has pointed to no case applying the "unique circumstances" doctrine in such a situation.

2. Even apart from the untimeliness of petitioner's notice of appeal, petitioner was manifestly not entitled to relief from the court of appeals because his attempted appeal was frivolous. Petitioner filed the present new trial motion more than six years after judgment was entered against him. As the district court correctly ruled, that motion was filed more than three years too late, regardless of whether the current

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appeals remanded the case, directing the district court to determine whether the lawyer had actually relied on the clerk's statement. See *id.* at 606. *Willis* presented a significantly different situation from the one here. As this Court has recognized, the language of the version of Federal Rule of Appellate Procedure 4(a) in effect at the time of *Willis* did not establish what constituted "filing" a notice of appeal. *Houston* v. *Lack*, 487 U.S. 266, 273 (1988); *id.* at 277 (Scalia, J., dissenting). Here, in contrast, the answer to petitioner's question was clear on the face of the Rule itself—the district court's order extended the time for appeal for 30 days beyond the ten-day period otherwise prescribed for criminal appeals. See Fed. R. App. P. 4(b)(4). In such a situation, it is not at all clear that the Eleventh Circuit would hold that petitioner was justified in relying on the faulty advice allegedly received by his stepfather from the court's employees.

or pre-1999 version of Federal Rule of Criminal Procedure 33 applies here. Pet. App. A7. Because affirmance of the judgment of the district court would have been required on that ground even had the appeal been timely, review by this Court of the "unique circumstances" issue is particularly unwarranted in this case.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
KIRBY A. HELLER
Attorney

SEPTEMBER 2001

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[2] The district court's cogent observations about the motion's lack of merit (in addition to its untimeliness) further emphasize the futile nature of petitioner's attempted appeal. See Pet. App. A6-A7.